A

BERJAYA DEVELOPMENT SDN BHD

v.

KERETAPI TANAH MELAYU BHD & ANOR

B

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
ZULKEFLI MAKINUDIN JCA
SURIYADI HALIM OMAR JCA
[CIVIL APPEAL NO: W-02-567-97]

C

19 SEPTEMBER 2007

CIVIL PROCEDURE: *Striking out - Striking out writ and statement of claim - Whether claim devoid of cause of action - Whether first defendant proper party to be sued - Rules of the High Court 1980,*

D

O. 18 r. 19 - National Land Code, s. 417 - Gazette Notifications P.U (A) 294 & P.U (A) 304

CONTRACT: *Breach - Leases - Specific performance - Lease of railway land - Lease terminated by Malayan Railway - Liability - Effect*

E

of Gazette Notification P.U (A) 294 - Whether right and liabilities respecting leases vested in second defendant - Suit against first defendant - Whether devoid of cause of action - Whether wrong party sued - Rules of the High Court 1980, O. 18 r. 19 - Gazette Notifications P.U (A) 294 & P.U (A) 304

F

This was an appeal against the decision of the learned High Court judge affirming the decision of the senior assistant registrar ('SAR') striking out the plaintiff's writ and statement of claim on the ground that it disclosed no cause of action against the first defendant. The facts were that, in 1982, the plaintiff executed a

G

Lease Agreement with one Malayan Railway ('KTM') in respect of a certain railway reserve. In 1984, the Lease Agreement was terminated by KTM. Subsequently, upon the coming into force of the Railway Act 1991 and the Railway (Successor Company) Act 1991 ('Successor Company Act'), all property of KTM became

H

vested in the second defendant, while the second defendant's rights and liabilities in turn became vested in the first defendant. Be that as it may, s. 3 of the Successor Company Act, read with Part II of the Schedule of the Vesting Order in Gazette Notification P.U (A) 294 issued by the Minister of Transport

I

('P.U (A) 294'), made clear that all rights and obligations of the

second defendant under the trading and commercial agreements were vested in the first defendant *except those arising from or relating to leases and tenancies* ('Vesting Order'). A

Following the termination of the Lease Agreement by KTM, the plaintiff negotiated for the grant of shorter-term leases to it, *albeit* unsuccessfully. The plaintiff hence filed the impugned writ alleging breach of contract and seeking for specific performance thereof. Before the learned justices of appeal herein, the plaintiff argued that: (i) the first defendant was the rightful successor to KTM; (ii) P.U (A) 294 was irrelevant to its claim; (iii) the relevant Gazette Notification was P.U (A) 304 dated 11 August 1995 which vested all rights and liabilities of the second defendant in the first defendant with retrospective effect from 1 August 1992, thereby making the first defendant a proper party to be sued; and (iv) the SAR had no inherent judicial power under s. 417 of the National Land Code ('NLC') to hear and decide on land matters involving a claim of RM3.5 million by the plaintiff without the consent of the parties concerned. These arguments apart, the plaintiff also sought to adduce new evidence to support its case, allegedly to prove that the first defendant was the owner of the railway reserve under the Lease Agreement. The first defendant maintained that it was not a party to the Lease Agreement, owed no obligation or liability to the plaintiff and had in fact been wrongfully sued by the plaintiff. B C D E F

Held (dismissing the appeal)
Per Zulkefli Makinudin JCA delivering the judgment of the court:

(1) Having regard to the relevant legislation and Gazette Notifications, the first defendant is not the successor company to KTM. In any case, the effect of P.U. (A) 294 or the Vesting Order is that all leases and tenancies remain vested with the second defendant. Since the plaintiff's claim was for specific performance of the Lease Agreement, and as the Vesting Order has excluded leases and tenancies, it follows that there was no vesting of rights or liabilities on the first defendant in respect of the Lease Agreement. On this ground alone the plaintiff's claim against the first defendant must fail. (para 6) G H I

(2) The rights and liabilities of the second defendant, the Railway Assets Corporation, in respect of the legal proceedings as specified in Part II of the Schedule in the Government Gazette P.U (A) 304 only apply to the legal proceedings clearly specified in the Schedule. Thus P.U (A) 304 is not applicable to the current appeal before this court because this suit was never listed in Part II of the Schedule. If it is indeed the intention of the Minister to vest all rights and liabilities with regard to this suit to the first defendant, the Minister would have explicitly included this suit into Part II of the Schedule just like the other cases. (para 9)

(3) Section 417(1) NLC is irrelevant as the subject matter of this suit was and is still breach of contract. That section only applies for the purpose of enforcement of any punishment or order of court, and does not nullify the jurisdiction of any Registrars to hear an application under O. 18 r. 19 Rules of the High Court 1980 ('RHC'). Further, the application made under O. 18 r. 19 RHC to strike out the plaintiff's claim is an interlocutory matter that may be heard either before a SAR or a Deputy Registrar. In any event, pursuant to Practice Direction No. 1 of 1995, all applications to strike out pleadings and indorsements under O. 18 r. 19 RHC shall be heard by the Registrar. (paras 11 & 12)

(4) No evidence but only the pleadings need to be taken into consideration by this court in the present appeal. However, even if the court were to consider the fresh documentary evidence under the plaintiff's two-motion applications in Encl. 24A and 46A herein, the evidence do not show that the first defendant is the owner of the railway lands under the Lease Agreement. As indicated by the plaintiff's own land title search, the 40 titles were issued to KTMB (Sentul) Sdn Bhd *via* Syarikat Tanah dan Harta Sdn Bhd and then transferred to Sentul Raya Sdn Bhd. The first defendant was never a party to the alleged transfer and KTMB (Sentul) Sdn Bhd and the first defendant were clearly separate entities altogether. (paras 14, 15 & 16)

(5) From the plaintiff's own evidence, it is clear that KTMB (Sentul) Sdn Bhd was the party to the land sale alleged by the plaintiff and not the first defendant. Therefore, the first defendant cannot be said to have sold the plaintiff's land to any third party on 3 August 1995, nor discreetly disposed of

any railway land at Sentul to Taiping Consolidated Berhad on 8 December 1993. Consequently, this is a fit and proper case for striking out under O. 18 r. 19 of the RHC. There was no cause of action against the first defendant and it was not the correct party to be sued. (paras 19 & 21)

[Order accordingly]

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan yang arif hakim Mahkamah Tinggi kerana mengesahkan keputusan Penolong Kanan Pendaftar ('PKP') yang membatalkan writ dan penyata tuntutan plaintif atas alasan bahawa ia tidak menyerlahkan apa-apa kausa tindakan terhadap defendan pertama. Faktanya adalah, pada tahun 1982, plaintif memeterai satu Perjanjian Pajakan dengan Keretapi Tanah Melayu ('KTM') berhubung suatu tanah rizab keretapi. Pada tahun 1984, Perjanjian Pajakan telah ditamatkan oleh KTM. Berikutan itu, dengan berkuatkuasanya Akta Keretapi 1991 dan Akta Keretapi (Syarikat Pengganti) 1991 ('Akta Syarikat Pengganti'), semua harta KTM telah diletakhak kepada defendan kedua, sementara hak-hak dan liabiliti defendan kedua pula menjadi terletakhak kepada defendan pertama. Namun begitu, s. 3 Akta Syarikat Pengganti, dibaca dengan Bahagian II Perintah Perletakhakan di dalam Pemberitahuan Gazet P.U (A) 294 yang dikeluarkan oleh Menteri Pengangkutan, menjelaskan bahawa semua hak-hak dan obligasi responden kedua di bawah perjanjian-perjanjian perniagaan dan komersial adalah diletakhak ke atas defendan pertama *kecuali perjanjian-perjanjian yang berbangkit dari pajakan-pajakan dan tenansi-tenansi* (Perintah Letakhak').

Ekoran penamatan Perjanjian pajakan oleh KTM, plaintif cuba merundingkan untuk pajakan jangka masa lebih pendek, namun gagal. Akibatnya, plaintif memfailkan writ yang dicabar mendakwa kemungkiran kontrak sekaligus memohon pelaksanaan spesifik baginya. Di hadapan yang arif hakim-hakim rayuan di sini, plaintif berhujah bahawa: (i) defendan pertama adalah pengganti sebenar KTM; (ii) P.U (A) 294 adalah tidak relevan kepada tuntutannya; (iii) Pemberitahuan Gazet yang relevan adalah P.U (A) 304 bertarikh 11 Ogos 1995 yang meletakhak semua hak-hak dan liabiliti defendan kedua kepada defendan pertama dengan kesan retrospektif dari 1 Ogos 1992 sekaligus menjadikan defendan pertama pihak yang betul untuk didakwa; dan (iv) PKP tidak

mempunyai kuasa kehakiman semulajadi di bawah s. 417 Kanun Tanah Negara ('KTN') untuk mendengar dan memutuskan atas perkara tanah yang melibatkan tuntutan oleh plaintif sebanyak RM3.5 juta tanpa persetujuan pihak-pihak terbabit. Selain dari hujah-hujah ini, plaintif juga memohon mengemukakan beberapa keterangan baru bagi menyokong kesnya, iaitu keterangan yang didakwa menunjukkan bahawa defendan pertama adalah pemilik tanah rizab keretapi di bawah Perjanjian Pajakan. Defendan pertama bertegas bahawa ia bukan pihak kepada Perjanjian Pajakan, bahawa ia tidak menanggung apa-apa obligasi atau liabiliti terhadap plaintif dan bahawa ia memang disalah dakwa oleh plaintif.

Diputuskan (menolak rayuan)
Oleh Zulkefli Makinudin HMR menyampaikan penghakiman mahkamah:

(1) Mengambilkira undang-undang dan Pemberitahuan Gazet yang relevan, defendan pertama bukanlah pengganti kepada KTM. Apapun, kesan P.U (A) 294 atau Perintah Letakhak adalah semua pajakan dan tenansi masih terletakhak kepada defendan kedua. Oleh kerana tuntutan plaintif adalah untuk pelaksanaan spesifik Perjanjian Pajakan, dan oleh kerana Perintah Letakhak telah menyisihkan pajakan dan tenansi, maka tidak wujud lagi perletakhakan hak-hak ataupun liabiliti kepada defendan pertama berkaitan dengan Perjanjian Pajakan. Atas alasan ini semata-mata, tuntutan plaintif terhadap defendan pertama sudah pun gagal.

(2) Hak dan liabiliti defendan kedua, Railway Assets Corporation, berhubung prosiding undang-undang seperti yang disenarai di dalam Bahagian II kepada Jadual di dalam Gazet Kerajaan P.U (A) 304 hanya terpakai kepada prosiding-prosiding undang-undang yang tersenarai dengan jelas di Jadual itu. Oleh itu, P.U (A) 304 tidak terpakai kepada rayuan semasa di hadapan mahkamah ini kerana guaman di sini tidak pernah disenaraikan di dalam Bahagian II kepada Jadual. Sekiranya Menteri memang berniat untuk meletakhak semua hak dan liabiliti berkaitan guaman di sini kepada defendan pertama, Menteri tentunya akan memasukkan guaman ini ke dalam Bahagian II kepada Jadual sepertimana halnya dengan kes-kes lain.

(3) Seksyen 417(1) KTN adalah tidak relevan oleh kerana halperkara guaman ini adalah dan masih lagi merupakan halperkara kemungkiran kontrak. Seksyen tersebut hanya terpakai bagi maksud penguatkuasaan mana-mana hukuman atau perintah mahkamah, dan tidak menghapuskan bidangkuasa mana-mana Pendaftar untuk mendengar permohonan di bawah A. 18 k. 19 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Selain itu, permohonan di bawah A. 18 k. 19 KMT untuk membatalkan tuntutan plaintif adalah perkara interlokutori yang boleh didengar sama ada di hadapan PKP atau Timbalan Pendaftar. Walau apapun, berdasarkan Arahan Amalan No. 1 Tahun 1995, semua permohonan untuk membatalkan pliding dan indorsmen di bawah A. 18 k. 19 KMT hendaklah didengar oleh Pendaftar.

(4) Tiada keterangan tetapi hanya pliding-pliding yang perlu diberi perhatian oleh mahkamah ini dalam rayuan semasa. Namun begitu, jikapun mahkamah akan menimbang keterangan dokumentar baru di bawah dua permohonan usul plaintif melalui lampiran 24A dan 46A di sini, keterangan tidak menunjukkan bahawa defendan pertama adalah pemilik tanah keretapi di bawah Perjanjian Pajakan. Seperti yang terserlah dari carian hakmilik yang dibuat oleh plaintif sendiri, semua 40 hakmilik telah dikeluarkan kepada KTMB (Sentul) Sdn Bhd melalui Syarikat Tanah dan Harta Sdn Bhd dan kemudian dipindahkan kepada Sentul Raya Sdn Bhd. Defendan pertama tidak pernah menjadi pihak kepada pemindahan tersebut dan KTMB (Sentul) Sdn Bhd dan defendan pertama adalah dua identiti yang berasingan sama sekali.

(5) Dari keterangan plaintif sendiri, jelas bahawa KTMB (Sentul) Sdn Bhd adalah pihak kepada penjualan tanah yang didakwa oleh plaintif, dan bukannya defendan pertama. Oleh itu, defendan pertama tidak boleh dikatakan sebagai telah menjual tanah plaintif kepada pihak ketiga pada 3 Ogos 1995, ataupun telah dengan secara rahsia melupuskan mana-mana tanah keretapi di Sentul kepada Taiping Consolidated Berhad pada 8 Disember 1993. Oleh yang demikian, ini adalah satu kes pembatalan d bawah A. 18 k. 19 KMT yang sesuai dan wajar. Tidak wujud apa-apa kausa tindakan terhadap defendan pertama dan ia bukanlah pihak yang betul untuk didakwa.

Case(s) referred to:

EBBW Vale Urban District Council v. South Wales Traffic Area Licensing Authority [1951] 2 KB 366 ***(refd)***

New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 LNS 1 ***(refd)***

Legislation referred to:

Companies Regulation 1966, reg. 17(1)
Contracts Act 1950, s. 74(1)
National Land Code, s. 417(1)
Railway Act 1991, ss. 2, 92(2)
Railway (Successor Company) Act 1991 s. 3(4)
Railway Ordinance 1948, s. 2
Rules of the Court of Appeal 1994, r. 4
Rules of the High Court 1980, O. 18 r. 19(1)(a), (2), O. 36 r. 2

For the appellant - M Manoharan; M/s M Manoharan & Co
For the respondents - Kumar Kanagasingam (Gobinath Karuppan with him); M/s Lee Hishammuddin Allen & Gledhill

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S1-22-125-94]

Reported by WA Sharif

JUDGMENT

Zulkefli Makinudin JCA:

Introduction

[1] This is an appeal by the plaintiff against the decision of the learned judge of the High Court at Kuala Lumpur dismissing the plaintiff's appeal against the decision of the learned senior assistant registrar allowing the first defendant's application to strike out the plaintiff's amended writ and statement of claim with costs.

Background Facts

[2] The relevant background facts of the case are as follows:

[3] On 23 April 1982 a lease agreement under seal was entered into between the plaintiff and the General Manager of the Malayan Railway for and on behalf of the Federal Land Commissioner in respect of a railway reserve. The lease was for 30 years with an option to renew for a further period of 30 years at an agreed rental. However, on 28 December 1984 the lease

was terminated by the Malayan Railway Administration purportedly by reason of a Government directive. Subsequently, there were negotiations between the parties to grant the plaintiff a lease on short term basis which did not materialize. Hence, the plaintiff filed a writ against the first defendant seeking for specific performance of the said lease agreement dated 23 April 1982 or alternatively for consequential damages.

[4] At the appeal stage before us the plaintiff had filed two notices of motion as in encl. (24A) and in encl. (46A) for leave to adduce fresh documentary evidence at the hearing of the plaintiff's appeal. Having heard the parties we made an order in term of the plaintiff's application in encl. (24A) and encl. (46A).

Decision On Appeal

[5] The main issue to be determined in this appeal is whether the learned judge of the High Court was correct in deciding that the pleadings by the plaintiff did not disclose a reasonable cause of action as against the first defendant having regard to all relevant legislations and Government Gazette Notifications. It is the contention of the first defendant that it is not a party to the lease agreement which is apparent from the pleadings. As such, the first defendant owes no obligation or liability to the plaintiff and has been wrongfully sued by the plaintiff. For the plaintiff it was argued that it was the then Malayan Railway or Keretapi Tanah Melayu which executed the lease agreement with the plaintiff and following from there Keretapi Tanah Melayu Berhad, the first defendant is the successor company to Keretapi Tanah Melayu. The plaintiff therefore contended that it had sued the rightful party.

[6] Having referred to the relevant legislations and Government Gazette Notifications we are of the view that the first defendant is not the successor company to the Malayan Railway. Section 2 of the Railway Ordinance 1948 ("the Ordinance") defines 'railway land' which includes, *inter alia* 'railway reserve'. 'Railway reserve' is also defined in the same section. Railway land has been defined under the Ordinance to mean land vested in or held by the Federal Lands Commissioner or any other person for the purposes of the railway and land in occupation or under the contract of the railway administration and includes railway reserve. The Railway Act 1991 ("the Act") came into force on 2 September 1991

which repealed the Ordinance. Section 2 of the Act defines 'railway reserves' in more or less the same fashion as the 'railway reserves' under the Ordinance. Although 'railway land' is not defined in the Act, s. 2 of the Act defines 'property' as moveable or immoveable property. Section 92(2) of the Act vests, *inter alia*, all property of the Malaysian Railway with the second defendant, the Railway Asset Corporation. Section 93 of the Act provides that all property vested in, held or acquired by the Federal Lands Commissioner under the repealed ordinance shall vest with the second defendant. The Railway (Successor Company) Act 1991 ("Successor Company Act") provides for the vesting of property, rights and liabilities of the Railway Assets Corporation in a company ie, the first defendant. Pursuant to s. 3 of the Successor Company Act and Part II of the Schedule of the Vesting Order of P.U.(A) 294 dated 30 July 1992 which was effective from 1 August 1992, it provides that all rights and obligations under the trading agreements and commercial agreements other than those arising from or relating to lease and tenancies are vested with the first defendant. In our view the effect of the vesting order is that all leases and tenancies remain vested with the second defendant. Since the plaintiff has claimed against the first defendant for specific performance in respect of the lease agreement and as the Vesting Order of P.U.(A) 294 dated 30 July 1992 excludes leases and tenancies, it is our judgment that there is no vesting of rights and/or liabilities on the first defendant in respect of the lease agreement. On this ground alone the plaintiff's claim against the first defendant must fail.

[7] Learned counsel for the plaintiff in his submission brought to our attention the provision of para. 2 of Gazette Notification P.U.(A) 304 signed by the Minister of Transport, on 11 August 1995 which states as follows:

> The Minister has appointed 1st August 1992 as the vesting date and on that date all rights and liabilities of the Railway Assets Corporation as in Part I of the Schedule and all rights and liabilities of the Railway Assets Corporation in respect of the legal proceedings as specified in Part II of the Schedule shall be transferred to and vested in the successor company, namely KERETAPI TANAH MELAYU BERHAD, 'without' any conveyance, assignment or transfer whatever.

[8] It is the contention of the plaintiff that under Part II of the Gazette No. 304 dated 11 August 1995, the Minister had included all the old cases sued by the then Malayan Railway against various defendants but had deliberately covered up all legal suits filed against the Malayan Railway and the successor company including the present suit filed on 12 March 1994. Section 3(4) of the Successor Company Act was also referred by the plaintiff which provides that it shall not be necessary for the company or the Railway Assets Corporation to give notice to the person whose right or liability is affected by the vesting under subsection (1). It is the contention of the plaintiff by virtue of P.U.(A) 304, Keretapi Tanah Melayu Berhad had assumed all rights and liabilities from Railway Assets Corporation with retrospective effect from 1 August 1992. The plaintiff had therefore sued the rightful party as Keretapi Tanah Melayu Berhad is automatically made a party to all litigations before the Courts in Malaysia.

[9] With respect we could not agree with the above contention of the plaintiff. It is our view that the rights and liabilities of the second defendant, the Railway Assets Corporation in respect of the legal proceedings as specified in Part II of the Schedule in the Government Gazette P.U.(A) 304 only apply to the legal proceedings clearly specified in the Schedule. Thus P.U.(A) 304 is not applicable and relevant to the current appeal before this court because this suit was never listed in Part II of the Schedule. We also take the view that if it is indeed the intention of the Minister to vest all rights and liabilities with regard to this suit to the first defendant, the Minister would have explicitly included this suit into Part II of the Schedule just like the other cases.

[10] It was also argued for the plaintiff that the affidavit affirmed by Nor Aida Othman, the Legal Officer on behalf of the first defendant is invalid and inadmissible and in fact was wrongly admitted before the senior assistant registrar and the judge. On this point learned counsel for the plaintiff referred to us the provision of the reg. 17(1) of the Companies Regulation 1966 which states that an affidavit or a statutory declaration sworn or declared for the purpose of the Act or these Regulations on behalf of a Corporation shall be sworn or declared by a director or by the secretary of the Corporation. Again, with respect we could not agree with the plaintiff's contention. It is our view the said reg. 17(1) is only applicable for the purpose of the Companies Act

and Companies Regulations and the same does not affect the validity of an affidavit affirmed by a person who has been duly authorized to affirm an affidavit on behalf of a corporation.

[11] Learned counsel for the plaintiff further argued as a ground of appeal that the learned senior assistant registrar has no inherent judicial power under s. 417(1) of the National Land Code 1965 to hear and decide on land matters which involved a claim of RM3.5 million by the plaintiff in this case without the consent of the parties concerned. With respect we could not agree. It has to be noted that the current suit was filed by the plaintiff seeking *inter alia*, specific performance of a lease agreement and damages arising from the alleged breach of contract. The subject matter of this suit was and is still a breach of contract. Further, the application made under O. 18 r. 19 of the Rules of the High Court ("RHC 1980") to strike out the plaintiff's claim is an interlocutory application that may be heard either before a senior assistant registrar or deputy registrar.

[12] The plaintiff's submission that pursuant to O. 36 r. 2 of the RHC 1980, both parties must agree to refer the matter to learned senior assistant registrar is also misconceived as the O. 36 r. 2 applies for matters to be tried or to be inquired before the registrar. As regards the provision of s. 417(1) of the National Land Code 1965, it is our view that it only applies for the purpose of enforcement of any punishment or order of the court. It does not nullify the jurisdiction of any registrars to hear an application under O. 18 r. 19 of the RHC 1980. In any event pursuant to Practice Direction No. 1 of 1995 issued by the Chief Judge of Malaya all applications to strike out pleadings and indorsements under O. 18 r. 19 of the RHC 1980 shall be heard by the registrar. Further the plaintiff did not raise any objection with regard to the power of the learned senior assistant registrar to hear the first defendant's application under O. 18 r. 19 of the RHC 1980 during the hearing before the learned assistant registrar and therefore the plaintiff is estoppel from raising the same at this stage.

[13] The plaintiff had challenged the Gazette Notification P.U.(A) 294 dated 30 July 1992 issued by the Minister of Transport as being irrelevant to the plaintiff's claim against the first defendant. The plaintiff has adduced various evidence to support its argument that Gazette Notification P.U.(A) 294 is rendered redundant,

obsolete and meaningless by the sale of plaintiff's leased land to third party. For the first defendant it was submitted that the court should reject the plaintiff's argument on this point. This is because the learned judge of the High Court had struck out the plaintiff's amended writ and statement of claim pursuant to O. 18 r. 19(1)(a) only. The first defendant contended that O. 18 r. 19(2) of the RHC 1980 shall *mutatis mutandis* apply to this court by virtue of r. 4 of the Rules of the Court of Appeal 1994 in that no evidence is admissible on an application under O. 18 r. 19(1)(a) of RHC 1980. On this point in the case of *New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 LNS 1 the Federal Court had this to say:

> the court must only consider the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action. The test to be applied is whether on the face of the pleading, the court could hold that the cause of action is obviously unsustainable.

[14] We therefore agree with the first defendant's submission that no evidence but only the pleadings are to be taken into consideration by this court in the present appeal. Even if we were to decide in this appeal by perusing the fresh documentary evidence under the plaintiff's two motion application in encl. (24A) and encl. (46A), which we had allowed the documents the plaintiff had produced are as follows:

(a) Title Deeds bearing Title No. HSD 98028 and HSD 98393;

(b) Location Plan with Land Title Deeds;

(c) Land Title Deed HSD 84515;

(d) Copies of SSM computer print-outs;

(e) A copy of the Consolidated Accounts of Keretapi Tanah Melayu Berhad.

(f) A copy of the International Accounting Standards 2002 and Applying International Accounting Standards;

(g) Copy of the Sale & Purchase Agreement dated 23 September 1995;

A (h) Kuala Lumpur High Court case under Originating Summons No. S5-24-1213-2003 and affidavit of Hamidah binti Maktar;

(i) Latest SSM print-out report;

B (j) Layout Plan from the Kementerian Pendidikan Malaysia;

(k) Copies of photographs;

(1) Copies of the first defendant Ordinary Resolution together with Form 52;

C (m) Extract of Annual Return on 9 June 2004; and

(n) Copy of Company Auditor's report.

[15] Having referred to the above mentioned documents, we find D that the evidence do not show that the first defendant is the owner of the railway lands under the lease agreement. As clearly evident from the plaintiff's own land title search at the Pejabat Tanah dan Galian WP, Kuala Lumpur, the 40 land titles were issued to KTMB (Sentul) Sdn Bhd *via* Syarikat Tanah dan Harta E Sdn Bhd and then transferred to Sentul Raya Sdn Bhd. The first defendant was never a party to the alleged transfer. KTMB (Sentul) Sdn Bhd and the first defendant are separate entities. The first defendant did not at any time receive a transfer of the said 40 land titles from any party.

F **[16]** As regards the plaintiff's submission that the first defendant was cited as the owner of the railway reserve land in the Kuala Lumpur High Court case under Originating Summons No. S5-24-1213-2003, we find that the sale and purchase agreement was G between the 15 purchasers and Sentul Raya Sdn Bhd. The first defendant was not privy to the sale and purchase agreement because Sentul Raya Sdn Bhd and the first defendant are different entities and that the evidence is not relevant whatsoever to the current appeal.

H **[17]** From the plaintiff's own search at the Suruhanjaya Syarikat Malaysia (SSM) on 28 February 2003, it merely shows that the first defendant is the shareholder of KTMB (Sentul) Sdn. Bhd. This does not change the position that the first defendant is different entity altogether. Moreover, the accounting definition I adopted by the International Accounting Standards Board is totally irrelevant because in law the first defendant is still a

different entity following the doctrine of separate legal entity. (See the case of *EBBW Vale Urban District Council v. South Wales Traffic Area Licensing Authority* [1951] 2 KB 366 at p. 370).

[18] It is our judgment that the first defendant is not the correct party to whom liability is attached as clearly evinced in Government Gazette P.U.(A) 294 which vests liabilities in respect of leases and tenancies with the second defendant. It is very clear that the new evidence the plaintiff seek to produce do not in any way show that the first defendant is the owner of the leased land under the lease agreement or owner of any railway reserve land. The evidence in any event do not change the position that pursuant to the Government Gazette P.U.(A) 294 liabilities in respect of leases and tenancies are vested with the second defendant and not with the first defendant.

[19] We also find the Board Resolution filed on 3 August 1995 with the Registrar of Companies relied upon by the plaintiff was the resolution of KTMB (Sentul) Sdn. Bhd and not that of the first defendant, as clearly evident from the face of the exhibit itself. KTMB (Sentul) Sdn Bhd and the first defendant are two totally different entities. From the plaintiff's own evidence, it is clear that KTMB (Sentul) Sdn Bhd was the party to the land sale as alleged by the plaintiff and not the first defendant. Therefore the first defendant cannot be said to have sold the plaintiff's land to any third party on 3 August 1995 nor discreetly disposed of any railway land at Sentul to Taiping Consolidated Berhad on 8 December 1993. In addition, the first defendant had never acknowledged the said Board Resolution of the first defendant as produced by the plaintiff in its affidavit dated 4 September 2006. In the said affidavit, the first defendant averred that "the resolution referred to by the plaintiff is a member's resolution passed by a subsidiary of the first defendant sometime in August 1995". The onus remains on the plaintiff and not the first defendant to prove the registration of Lot PT3 and PT2 bearing Title Nos. HSD 98028 and HSD 98393 involved the first defendant. In any event, the first defendant was never a party to the alleged transfer for reasons already given. The plaintiff's Surveyor's Plan and the photograph taken in September 2004 as produced at the hearing of this appeal also do not prove that the said land was owned or disposed off by the first defendant.

[20] Learned counsel for the plaintiff had submitted before us that the learned judge failed to apply the rule of *Hadley v. Baxendale* under s. 74(1) of the Contracts Act 1950 wherein the plaintiff contended that the first defendant had broken the contract and therefore the plaintiff is entitled to receive compensation for damages. We find the issue of damages under s. 74(1) of the Contracts Act 1950 is premature and irrelevant to the present appeal before this court. The plaintiff is not entitled to any damages whatsoever as liability has not been established against the first defendant. The first defendant is not the proper party to be sued in this action and that no liability is owed to the plaintiff.

Conclusion

[21] It is our judgment that this is a fit and proper case for striking out under O. 18 r. 19 of the RHC 1980. The learned judge had rightly confined himself within the four corners of the pleadings in deciding as to whether there is a cause of action against the first defendant. The learned judge had rightly considered the entire set of facts as disclosed in the pleading in deciding that there was no cause of action as against the first defendant as it was not the correct party to be sued.

[22] For the reasons stated we dismissed the plaintiff's appeal with costs and made an order that the deposits be paid to the first defendant to account of taxed costs.